IN THE

Supreme Court of the United States

October Term, 1978
No. 77-1680

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

GARY DEFILLIPPO,

Respondent.

Brief of the National Legal Aid and Defender Association as Amicus Curiae in Support of Respondent.

QUIN DENVIR,
California State Public Defender,

LAURANCE S. SMITH,
Deputy State Public Defender,

455 Capitol Mall, Suite 360,
Sacramento, Calif. 95814,
(916) 322-5298,

Attorneys for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Brief of the National Legal Aid and Defender Association as Amicus Curiae in Support of Respondent.

Interest of Amicus Curiae and Consent.

The National Legal Aid and Defender Association is a nonprofit corporation, formed, *inter alia,* to assist defender offices in the United States in their efforts to secure the constitutional rights of indigent defendants by vigorous and competent representation.

A decision by this court in the instant case could have a substantial and perhaps devastating impact upon the rights of all citizens to be free from unreasonable searches and seizures of their person. Accordingly, the National Legal Aid and Defender Association is filing this brief as *amicus curiae* pursuant to the authority

of its governing board and the vote of its Committee on Briefs Amicus Curiae.

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to the filing of this brief has been given by the Office of the prosecuting attorney for the County of Wayne, Michigan, counsel for petitioner, and by James Howarth, Esq., counsel for respondent. Letters of consent from both counsel should be on file with the Clerk of this Court.

ARGUMENT.

I

THERE IS NO EFFECTIVE REMEDY OTHER THAN THE EXCLUSIONARY RULE FOR FOURTH AMENDMENT VIOLATIONS ACCOMPLISHED PURSUANT TO A CITY ORDINANCE APPARENTLY DESIGNED TO AUTHORIZE THEM.

A. The Scope of Authority Provided Under the Ordinance Exceeds Constitutional Limits.

At the time of the defendant's arrest, Detroit Municipal Code section 39-1-52.3 provided:

> "When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, *the police officer may transport him to the nearest precinct in order to ascertain his identity.*"
>
> (*People v. DeFillippo* (1977) 80 Mich.App. 197, 200-201 (emphasis added).)[1]

The ordinance thus gives awesome authority to the police in their daily contacts with citizens. The power of inquiry granted the police officer is not limited;

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[1]A 1976 Amendment added an express provision to make it a crime to refuse to identify oneself, but the Michigan Court held that refusal to identify oneself was "implicit" in the ordinance as it read at the time of the defendant's arrest. (80 Mich.App. 197, 201, n. 1.)

there is no adherence in the ordinance to the requirements of *Terry v. Ohio* (1968) 392 U.S. 1 and *Adams v. Williams* (1972) 407 U.S. 143, that stops be *brief* in nature, that they be based upon some objective, articulable belief that the person stopped is engaged in criminal activity, and that any search of the person conducted incident to such a stop be limited to a protective "patdown" for weapons.

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, *the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest,* although it may alert the officer to the need for continued observation." (*Terry v. Ohio* (1968) 392 U.S. 1; 34 (Justice White concurring) (emphasis added).)

The *Terry* principle was restated in *Adams v. Williams, supra,* 407 U.S. 143, 146: "[¶] A *brief* stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (407 U.S. 143, 146 (emphasis added).)

In its brief, Michigan emphasizes only those passages in *Terry* and *Adams* which permit the determination of identity (Petitioner's Brief 25, n. 10); petitioner

fails to concentrate on the critical language which specifies that only a "brief stop" is permitted; the "brief stop" is allowed in order to maintain the status quo *momentarily,* thus emphasizing the short permissible duration of the contact.

Contrary to *Terry,* the ordinance here appears to authorize full, custodial arrests on vague "suspicion" of nothing in particular except a failure to verifiably identify oneself. Thus, it is intended to permit the type of full-scale personal search as was conducted here upon vague grounds not amounting to probable cause; such searches are only permissible when incident to a *lawful* custodial arrest. The ordinance fails sight of the fact that custodial arrest is only constitutional where there is probable cause of commission of a specific offense. (*United States v. Robinson* (1973) 414 U.S. 218.)

The ordinance also contains a number of other ambiguities which provide the potential for further abuse. In addition to its failure to describe the extent of the inquiry permitted to the police officer, neither is guidance provided as to what the citizen must provide in the way of information in order to escape arrest. For example, our soldiers are taught that in the event of capture they must give only their "name, rank and service number". If a citizen answered a Detroit officer in such a manner, what is to prevent the officer from deeming the response unsatisfactory, and jailing the citizen? Under the rubric of an "identity inquiry" police questioning could extend into areas other than identity and constitute a serious invasion of the person's privacy. Being menaced with detention, the citizen responding to an officer so empowered would be hard pressed *not* to provide whatever information was re-

quested, a situation made the worse by lack of any requirement that the citizen be advised that he has Fifth Amendment rights not to answer any question calling for self-incrimination.

B. The Fourth Amendment May Not Be Evaded Through "Good Faith" Reliance by Officers on Unconstitutional Fiat of the Legislative or Executive Branches.

While noting in their brief that not even an "act of Congress can authorize a violation of the Constitution" (Petitioner's Brief at 12-13, Citing *Alameda-Sanchez v. United States* (1973) 413 U.S. 266, 272), it is evidently Michigan's intent to argue here that an ordinance of the City Council of Detroit can; or at least that it can do so free from sanction.

We begin our response to this assertion with the observation that it has never been held that the executive branch of state government may take unconstitutional action and then "sanitize" the fruits of an ensuing search by reliance on the "good faith" of searching officers. (See *Coolidge v. New Hampshire* (1971) 403 U.S. 443.) In *Whiteley v. Warden* (1971) 401 U.S. 560, 568, it was held that "good faith" reliance on a radio bulletin was insufficient to insulate a challenge to an otherwise unlawful arrest. Moreover, if officers make a search pursuant to a judicial warrant not founded upon probable cause, their good faith does not defeat a challenge to the search. (*Aguilar v. Texas* (1964) 378 U.S. 108; *Spinelli v. United States* (1969) 393 U.S. 410.)

As the Court said in *Henry v. United States* (1959) 361 U.S. 98, 102, "Good faith on the part of the

arresting officers is not enough." Or, as Justice Stewart said for the court in *Beck v. Ohio* (1964) 379 U.S. 89, 97: "[¶] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects, only in the discretion of the police."

If actions of magistrates or executive officers cannot authorize "good faith" unlawful searches free from the sanction of the exclusionary rule, then it should follow *a fortiori* that the actions of a deliberative body such as a legislature or council cannot do so. For the legislative body is not usually faced with the necessity to act quickly according to the exegencies of a particular situation; it may take all the time it likes to deliberate and receive the considered advice of counsel.

1. The Fiats of Town Councils Are Subordinate to the Commands of the Constitution, Not Vice-Versa.

There may indeed be appeal in the argument that the policeman on the beat should not be required to be a seasoned constitutional lawyer, weighing during each street encounter the authority granted him by statutes in light of the commands of the commerce clause (Art. I, § 8) and scores of other provisions which are, in light of the policeman's training and duty, quite arcane.

That, however, is not the issue presented by this case.

The narrow question before this Court is: when a policeman acts pursuant to a statute or ordinance the express purpose of which appears to be the *authorization* of unconstitutional searches and seizures of the

person,[2] may the fruits of such an unlawful search be used in a court of law during a criminal prosecution of the illegally-searched citizen? We believe that to hold the Fourth Amendment does not apply, or that the exclusionary rule is not available to enforce it in such a case, is to hold starkly that one of the most important constitutional assurances of both governmental integrity and personal liberty is no stronger than the whim of any town council which desires to overthrow it.

It is a considerable understatement to say that such a state of affairs does great violence to the constitutional precept (Art. VI) that it shall be the constitution which limits the power of town councils, and not town councils which limit the power of the constitution.

C. Michigan's Position, if Adopted by This Court, Might Result in the "Last Straw" Which Could Produce Effective Nullification of the Fourth Amendment.

In recent times, the Court has followed a trend narrowing the Fourth Amendment by interpretation which has reached a point which many reasonable citizens consider to be the precipice of outright negation.[3] For example, the "papers and effects" of citizens which they have been forced by the demands of our

[2]As this Court unanimously pointed out in *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 169, "A direction by a legislature to arrest all "suspicious persons would not pass constitutional muster". See also discussion under sub-part "A", *ante*.

[3]We are of course reminded here of Erskine's observation, made during the trial of Thomas Paine, that arbitrary power is never introduced into a country all at once; always it is introduced in slow steps, lest the people see its approach. (*The Trial of Thomas Paine* (1792) 22 How. St. Tr. 358, 443.)

modern economy to place in the hands of banks are subject to summary government seizure without notice, warrant, or even probable cause. (*United States v. Miller* (1976) 425 U.S. 435.) A government wishing to harass and intimidate its people by compiling dossiers of their associations, habits and beliefs now has only to visit the corner bank in order to do so.

The right of the people to an unfettered free press has also been impaired by authority granted by this Court to conduct surprise raids upon the files of journalists pursuant to search warrant; *Zurcher v. Stanford Daily* (1978) .... U.S. .... [56 L.Ed.2d 525]. By clear implication, other constitutional interests such as the right to counsel and to the free exercise of religion are equally jeopardized, in that there appears no impediment to similar searches of the confidential files of attorneys or clergymen.

And of course there will be no lawsuit allowed in any federal court against a prosecutor who intentionally procures the issuance of a warrant to search such files without probable cause, nor against a magistrate who willfully issues such a warrant: both have been cloaked with absolute immunity from responsibility by decisions of this Court. (*Imbler v. Pachtman* (1976) 424 U.S. 409; *Stump v. Sparkman* (1978) .... U.S. .... [55 L.Ed.2d 331].[4]

In another decision, it was held that a "waiver" of whatever Fourth Amendment rights may be retained by the people may be obtained by leaving the person giving up those rights totally unaware that he has the right to do anything but submit meekly to officers'

[4]The legislators who enacted this ordinance are also immune from responsibility in damages. (*Tenny v. Brandenhove* (1951) 341 U.S. 367.)

assertions of authority. (*United States v. Watson* (1976) 423 U.S. 411.) In *South Dakota v. Opperman* (1976) 428 U.S. 364, it was held that a full search of an automobile may be conducted without probable cause that it will reveal anything in particular, for mere "caretaking" purposes. Also, the occupants of any vehicle may be ordered out of it routinely. (*Pennsylvania v. Mimms* (1977) .... U.S. .... [54 L.Ed.2d 331].)

Most recently, the right of the people to be secure *in their own homes* has been greatly compromised by a holding that the Fourth Amendment has little to say about the unreasonable search of an auto or home unless the government then uses the fruits of that search as evidence against the auto- or home-owner in a criminal prosecution. (*Rakas v. Illinois* (1978) .... U.S. .... [47 U.S.L.W. 4025].) Once Fourth Amendment interests have been irreparably invaded, the victim, if he is not prosecuted, is to be left primarily to state remedies of trespass (.... U.S. .... [47 U.S.L.W. at 4027]) which may be legally blocked by sovereign immunity; and which are almost always practically blocked by the outrageously prohibitive cost to the private person of engaging in civil litigation.

Now the state of Michigan has come to this Court to urge that there is nothing wrong in the light of the Fourth Amendment with an ordinance conferring the power on police not to just briefly stop on the street but to fully search and then physically incarcerate a citizen whose presence on the public street is vaguely "suspicious" to an officer; though such "suspicion" is not sufficiently cohate to authorize an arrest for any definable public offense. Michigan thus seeks to stretch the inch of reasonable authority granted by

Terry v. Ohio, supra, (1968) 392 U.S. 1 into an oppressive mile. In the alternative, they argue that even if there *is* something wrong with such an enactment, they should be freely allowed to use the fruits of extensive personal searches of those they arrest pursuant to it, at least until someone with the wherewithall to do so manages to invent a way to get into court and have the ordinance declared unconstitutional in some binding manner.

Because of the possibly fatal damage the urged substantive construction of the Fourth Amendment will do, and because there is in practical fact no *effective* remedy left other than the exclusionary rule—petitioner certainly suggests none—both arguments must fail.

D. The Exorbitant Expense of Civil Litigation, as Well as the Maze of Doctrinal Obstacles to Effective Relief, Render Such Litigation Ineffective to Enforce the Commands of the Fourth Amendment; the Exclusionary Rule Is the Only Workable Remedy.

It is perhaps well to begin this part with a brief review of the thought which has led this Court to fashion the exclusionary rule as a means of enforcement of the Fourth Amendment. That no other effective means of enforcement has yet been devised, despite the long lament of those who think the enforcement of the criminal law against individuals should take precedence over the enforcement of the constitution against officers of the government, should be proof enough of the soundness of this reasoning.

In *Weeks v. United States* (1914) 233 U.S. 383, 393 the Court stated:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

Then, in *Mapp v. Ohio* (1961) 367 U.S. 643, in an opinion which outlines the history and development of the Rule, the Court voiced through Mr. Justice (and former Attorney General) Clark, the continuing sentiment that the Fourth Amendment was self-executing:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'." (367 U.S. at 655.)

Given these pronouncements on the fundamental character of our constitutional charter, it would seem anomalous that the city of Detroit, through an ordinance, could effectively overrule and abrogate the Fourth Amendment by so little as the enactment of this ordinance.

1. The Exclusionary Rule Was Designed to Serve the Imperative of Judicial Integrity by Insulating the Courts From Participation in Violations of the Fourth Amendment.

In *Weeks,* the United States Marshal, an officer of the court, improperly secured evidence by an unlawful search and seizure and the Court held the evidence inadmissible. The Court held: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action." (233 U.S. 383, 894.) Of course, the same purpose was acknowledged in *Mapp v. Ohio, supra,* 367 U.S. 643, 648-649, 659-660, following the Court's recognition of "the imperative of judicial integrity" in *Elkins v. United States* (1960) 364 U.S. 206, 222.

The failure of our system of justice to bring to account those who violate both the Constitution and the rights of privacy of others may have awesome consequences. Perhaps the best articulation of this principle was made by Mr. Justice Brandeis in his dissenting opinion in *Olmstead v. United States* (1928) 277 U.S. 438, 485:

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites

every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

2. The Cost of Civil Litigation and the Ability of Government Officers to Out-Litigate Private Citizens.

As an alternative to the exclusionary rule in criminal cases, some have suggested a substitute civil action against the government with a maximum limitation on recovery. A civil rights action against state officers exists under 42 U.S.C. § 1893 (See *Monroe v. Pape* (1961) 365 U.S. 167), and since 1971 an action for money damages may be brought against a federal officer for violation of the Fourth Amendment. (*Bivens v. Six Unknown Named Agents* (1971) 403 U.S. 388.) Such an action is not, however, available here against the legislative body which clothed the officer with unconstitutional powers (*Tenny v. Brandenhove* (1951) 341 U.S. 367), and the officers may use good faith reliance on the unconstitutional ordinance as a defense in an action against them.

In *Norton v. United States* (4th Cir. 1978) 581 F.2d 390, cert. den., ... U.S. ..... (1978), an action was brought by a person whose apartment was forcibly entered without a search warrant by officers with drawn guns. The action was filed against state officers (42 U.S.C. § 1983) and federal officers (*Bivens*) as well as against the United States under the 1974 amendment to the Federal Tort Claims Act (28

U.S.C. 2680(h)). The Court of Appeals held that in civil actions against the individual state or federal officers, the officers had the "good faith" defense available to them, i.e., the officers acted in good faith with a reasonable belief of the lawfulness of their conduct. (581 F. 2d at 390, 393, n. 2.) The Court also found that the defense was available to the United States. The "good faith" defense has thus swallowed whole potential civil actions against officers for Fourth Amendment violations, for no police officer can be expected to admit his own bad faith and proof of the contrary would require E.S.P.

And of course the initiation of a federal civil action entails many substantial expenditures; though the defendant officers may have a right to government-paid counsel, the plaintiff does not. The inherent costs are an overwhelming deterrent to such litigation. Practicing lawyers experienced in litigation of this nature know that the attainment of compensatory damages, let alone the cost of litigation, is generally an illusory hope.

The criminal case admittedly provides a limited forum for obtaining redress for those subject to illegal police searches, but something is better than nothing. For example, the instant criminal action was the vehicle for the so-far successful challenge of this impermissible and unconstitutional ordinance; and it is a fair bet that further unlawful acts against innocent citizens pursuant to it have been curtailed due to the desire of officers to make arrests which will "stick" rather than arrests which will be "thrown out".

The defendant in a criminal case, after all, has a strong motivation to enforce his rights; and he also has a lawyer to aid him in doing so. This Court has said that Fourth Amendment remedies should be

those which individuals are motivated to use. (*Alderman v. United States* (1969) 394 U.S. 165, 174.)

The low chance for substantial recovery and the high cost of maintaining civil litigation combine to motivate citizens *not* to use it as a means of enforcing the Fourth Amendment.

3. The Doctrinal Obstacles to Effective Civil Redress Are in Any Event Insurmountable.

Myriad pitfalls and roadblocks which have been erected under such rubrics as "standing" and "comity" make it highly questionable that a binding judicial declaration of unconstitutionality of this ordinance could ever be obtained except in the context of the invocation of the exclusionary rule.

For example, according to a majority of this Court, even a showing of a consistent, non-isolated pattern of unconstitutional abuse in the implementation of this ordinance would not create such a "case or controversy" under Article III as would authorize an injunction against such practices. (*Rizzo v. Goode* (1976) 423 U.S. 362.) Citizens feeling generally chilled or inhibited from the exercise of their rights to free passage over the public ways could be barred from relief on grounds their claims were "conjectural" or "hypothetical." (*O'Shea v. Littleton* (1973) 414 U.S. 488, 494; *Younger v. Harris* (1971) 403 U.S. 37, 41-42.)

Of course, those like respondent who are so directly and immediately chilled in the exercise of their rights as to be the subject of actual prosecution in a state court would be barred from suing to enjoin such prosecution on grounds of unconstitutionality by the doctrine of comity, as set out in the main holding of *Younger v. Harris, supra.* Such persons would be left to vindicate

their rights in the course of the pending state proceeding; but if Michigan's anti-exclusionary rule argument prevails here, there will be no means left of doing so.

On paper, one could construct a scenario under *Steffel v. Thompson* (1974) 415 U.S. 452 whereby there would be justiciable controversy. Though of course the law prohibits rich and poor alike from sleeping under bridges (or, as here, urinating in alleys), any claims by the rich or "respectable" segments of society under this ordinance would be subject to attack under *Rizzo* and *Younger* as being unduly hypothetical. Thus, one would only have to find a plaintiff willing to publicly disgrace himself by declaring himself to be an inherently suspicious-looking person who has, as such, been directly threatened with arrest under the ordinance. Perhaps the individual so named could even constitute himself the representative of a class of other similarly-situated suspicious persons.

Of course, if the plaintiff so selected actually were arrested or prosecuted by state authorities after suit were filed, the case would be subject to immediate dismissal. (*Hicks v. Miranda* (1975) 422 U.S. 332.)

In order to frame a scenario for litigation of the validity of this ordinance which will fit under *Steffel* and survive attack under *Rizzo, Younger,* and *Hicks,* therefore, one must thus frame a farce. The situation is quite different than that of the labor picketers in *Steffel,* who had direct economic motivation to vindicate their rights, and who did not have to shame themselves in order to do so.

We do not think the framers of our constitution envisioned that in order to enforce its provisions, citi-

zens would have to participate in such a judicial version of low comedy; comedy which is just as "hypothetical" as the referenced plaintiff's claims in *Rizzo* and *Younger* because reality will prevent it from ever being staged.

Finally, if anything additional needs to be said along these lines, it should be noted that the courts of most states, including Michigan, adhere to the doctrine that they are not bound by the rulings of federal courts below the Supreme Court, even on constitutional issues. This means, simply, that even if a federal declaratory judgment of unconstitutionality *were* obtained, the state courts would not be bound to honor it and police could go right on claiming "good faith" — especially those who were not named as defendants and served with orders. This has led at times to situations which exasperated federal courts have been moved to describe as a "judicial runaround." (*Lucas v. People of Michigan* (6 Cir. 1970) 420 F.2d 259, 262; See also, e.g., *People v. Bradley* (1969) 1 Cal.3d 80, 86; 81 Cal. Rptr. 457; *People v. Cummings* (1974) 43 Cal.App.3d 1008, 1019; 118 Cal.Rptr. 289.)

This Court has not heretofore been willing to foreclose such "runarounds"; saying no more than that where such a judgment is issued by a three-judge federal court, which is affirmed on direct appeal to this Court, the *implication* is that any conviction under such a statute would be reversed by this Court. An "implication" is far less than a promise, though; for the court went on to say that even this proposition is "not free from difficulty." (*Steffel v. Thompson, supra,* 415 U.S. at 470.) Here, moreover, there will be no three-judge court, and thus no direct affirmance by this Court, because only a local ordinance is involved. (*Moody v. Flowers* (1967) 387 U.S. 97.)

Clearly, at least as far as the unconstitutional invasions sanctioned by this ordinance are involved, there is no way to reach them except by use of the exclusionary rule to suppress the evidence of other violations which are the hoped-for, if only infrequently realized, motivation for arrests under it.

E. Street Detention Is in Fact of Only Marginal Usefulness in the Control of Crime; Thus the Social Cost of Application of the Exclusionary Rule to It Is Minimal.

It has often been argued that each time the exclusionary rule is invoked, a "substantial social cost" is paid by society. (See, e.g., *Rakas v. Illinois, supra,* .... U.S. .... [47 U.S.L.W. at 4028]; *Stone v. Powell* (1976) 428 U.S. 465.) *Stone v. Powell,* of course, presents a situation which is half comparable to the instant case in that it involved a collateral attack on a conviction for murder on grounds the defendant had been initially arrested pursuant to a vague municipal loitering ordinance. (This factor had been declared "harmless error" both on direct appeal and by the district court on habeas corpus.)

The "social cost" argument of course appears most compelling when one takes an isolated case of murder and argues that the exclusionary rule should not be used to free a killer. But overall, the fact is that neither the exclusionary rule nor police "investigatory" stops of "suspicious" citizens found by chance upon the streets have very much at all to do with the government's ability to control violent crime. This proposition is proven by empirical research which has been conducted on the subject. In a recently published, elaborately researched study for the Ford Foundation, it has

been determined that the exclusionary rule has little or no impact on prosecutions for violent felonies, but only affects a significant minority of petty drug cases[5] such as that involved here. Moreover, police field interrogation of miscellaneous persons on the street has no notable tendency to cut crime rates; what cuts crime is when the police get out of their squad cars and make themselves known to the "ordinary" citizens on their beat who then provide them with reliable information. When prosecutions fail, it is generally not the result of *Mapp* or *Miranda*, but of the failure of the police to do a workmanlike job of interviewing witnesses and retaining evidence of crimes reported to them. (Silberman, *Criminal Violence, Criminal Justice* (1978) Ch. 7, pp. 199-252. See also Rand Corp., *The Criminal Investigation Process* (1975) vol. 1 pp. vi-ix.) Also of great significance, and consonant with these findings, even petitioners' own supporting *amici*, the Citizens for Effective Law Enforcement, concede that their own research discloses no significant relationship between field interrogations and felony arrests. (Brief of Citizens for Effective Law Enforcement, 8-10.)

"Law and order" attacks upon the Bill of Rights and upon prior decisions of this Court which enforce it are thus in a very substantial way a smokescreen designed to make the judiciary scapegoats for police and prosecutorial authorities' inability to efficiently discharge their own duty. If this Court should allow

[5]For example, statistics compiled by the National Commission on Marijuana and Drug Abuse disclose that a total of 43% of the "outdoor" arrests for marijuana were initially based upon "suspicious behavior" or "suspected loitering". (National Commission on Marijuana and Drug Abuse, Marijuana: a Signal of Misunderstanding (1972) Appendix II, table 18 at p. 638.)

its own judgment to be obscured by that smokescreen, the result will not be so much safer streets as it will be a populace which is oppressed by arbitrary exercises of police power as well as by the maraudings of criminals.

The right to use the public streets unmolested by arbitrary police demands for "identification" is, as was pointed out in *Papachristou*, one of a number of "unwritten amenities [which] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity . . . they have encouraged lives of high spirits rather than hushed, suffocating silence". (405 U.S. at 164.)

Such "amenities" deserve the continued protection of this Court.

* * *

II

THERE ARE AMPLE GROUNDS FOR DECISION OF THIS CASE UNDER MICHIGAN STATE LAW: THE MATTER SHOULD BE REMANDED TO THE STATE COURTS FOR DETERMINATION OF THOSE GROUNDS.

A comparison of the points and arguments raised by respondent's counsel before the Michigan appellate court with the opinion of that court reveals that there are many potential independent grounds for decision of this case under the law of Michigan. These substantial grounds were passed over and ignored by the Michigan appellate court in a headlong race to decide the case on federal constitutional grounds.

Principles of federalism and of economy in the administration of federal justice lead to the conclusion

that state courts ought not to be permitted to touch off constitutional brouhahas of the type represented here by merely overlooking or ignoring their own law.

For example, at page three of his state appellate brief, respondent points out that the Michigan courts have held that vague laws violate the Constitution of Michigan as well as that of the United States, citing *People v. Adams* (1971) 34 Mich.App. 546, 558.

At page four, respondent went on to ask the court to construe several terms of the ordinance:

> "What does it mean to 'identify' oneself properly under the ordinances? What is 'reasonable evidence' of one's 'true identity'? . . . Is some sort of document required? A document issued by whom? . . . Is it now required that all who cross the boundaries into the city of Detroit carry 'verifiable documents' such as a passport? . . ." (Ibid. p. 4.)

At pages 8-9 of the state appellate brief, it is suggested that the ordinance may be void under what would appear to be a state substantive due process doctrine. "The police power does not encompass the authority to make nonculpable conduct a criminal offense. See *City of Detroit v. Bowden* (1967) 6 Mich. App. 514." At page 13, a State Supreme Court decision, issued long before the Fourth Amendment was ever applied to the States (*People v. Burt* (1883) 51 Mich. 199, 202) is cited for the proposition that arrest is forbidden without probable cause to suspect a crime.

Finally, at pp. 18-22, respondent devotes an entire segment of his brief to an argument that the ordinance is void as being pre-empted by the exclusive authority

of the governor to declare states of emergency. (*Walsh v. City of River Rouge* (1970) 385 Mich. 623.)

Had any of these arguments been given favorable consideration by the Michigan Court of Appeal, the result would have made review by this Court unnecessary. Now, even though certiorari has been granted, there would be nothing to prevent the state court from determining those issues should this case be returned to it following reversal on the (federal) merits. Were this to occur, any exposition by this Court on the constitutional issues seemingly presented could be rendered purely hypothetical. In terms of Michigan's interests, there would then be only a "profitless reversal, which can do the plaintiff in error no good." (*Murdock v. Memphis* (1875) 87 U.S. (20 Wall.) 590, 635.)

As the court said in *Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126:

> "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." (See also, *Lanza v. New Jersey* (1922) 260 U.S. 377, 387; *Fox Film Corp. v. Muller* (1935) 296 U.S. 207, 210; *Department of Mental Hygiene v. Kirchner* (1965) 380 U.S. 194, 197.)

In *International Steel & Iron Co. v. National Surety Co.* (1936) 397 U.S. 665, 666, it was held that if a state court might have rested its decision on state grounds but did not do so,[6] application of the "inde-

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[6]There is language in the opinion of the Michigan appellate court, reproduced at p. 21 of the appendix, which would support a colorable argument that the state court *did* base

(This footnote is continued on next page)

pendent state ground doctrine" is not mandatory. This does not mean, however, that in the exercise of sound discretion, this Court cannot request a state court to clarify whether a case before it truly presents a federal question in a posture which is ripe for decision by this Court as a "case or controversy" under Art. III.

The most needed thing for the Michigan courts to do here is to construe the terms of this ordinance, for a narrowing construction could both obviate respondent's "vagueness" attack upon it and leave it clear that respondent's arrest was not authorized by the ordinance. For example, California has a partly comparable statute, California Penal Code section 647 (e), which requires that a person seen loitering at night identify himself when articulable circumstances exist to indicate that the public safety requires such identification. Section 647(e) does *not* permit police to place a citizen under custodial arrest for the purpose of ascertaining his identity. In *People v. Soloman* (1973) 33 Cal.App.3d 429, 108 Cal.Rptr. 867, it was held that this statute did not authorize arrest for the reason that an officer deems the explanation given by the citizen to be unsatisfactory or implausible. (*Cf.* Brief of State of California, pp. 9-13.) Were the Detroit ordinance read the same way, this case might never have come before this Court.

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its decision on state grounds in that a decision of the Michigan supreme court [*Pinkerton v. Verberg*, 78 Mich. 573, 584, 44 N.W. 579 (1889)] decided prior to the incorporation of the Fourth Amendment into the Fourteenth by this Court, is cited for the proposition that the search here is unlawful. The argument in the text is thus not intended to contradict or foreclose respondent should he seek to demonstrate that the decision below was decided on independent state grounds; rather, it is as an alternative should such an argument not be made or should it be made and fail.

We are in full agreement with Professor Linde, who argues that since the decision by a state court of state law is an element of the process due in a state judicial proceeding, federalism *requires* the state court to resolve dispositive questions arising under its own law before reaching a federal claim. Linde, "Without 'Due Process': Unconstitutional Law in Oregon" (1970) 49 Ore.L.Rev. 125, 134.

Throughout most of this nation's history, it has been the state courts which have served as the primary guarantors of individual rights. (Hart & Wechsler, *The Federal Courts and the Federal System* [2d Ed. 1973] 359.) While it may or may not be true that "If our liberties are not protected in Des Moines, the only hope is in Washington" (Paulsen, "State Constitutions, State Courts, and First Amendment Freedoms" (1951) 4 Vand.L.Rev. 620, 642, we think this Court should insist that the courts in Des Moines and Detroit should be required to examine the matter of protection of local citizens' liberties under local law *before* trundling sets of litigants off to Washington through decisions based on what may be needlessly sweeping federal grounds.

This Court should exercise its discretion to vacate and remand to the Michigan courts for clarification along these lines.

Respectfully submitted,

QUIN DENVIR,
California State Public Defender,

LAURANCE S. SMITH,
Deputy State Public Defender,
Attorneys for Amicus Curiae.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1978.
